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Transaction Being Analyzed: Pocahontas Parkway

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KEY ELEMENTS OF PUBLIC PRIVATE PARTNERSHIP ("PPP") AGREEMENTS

Last Updated: September 2005

No.	Key Element/Legal Issue:	Response/Suggested Model Provision:
1.	Type of PPP agreement: a. Design-Build-Operate-Maintain b. Pre-Development Agreement c. Concession - Investor Financed d. Concession - Tax-exempt Financed e. Other _____	Other: Comprehensive Agreement to Design-Build-Operate-Maintain.
2.	Agreement resulted from: a. Unsolicited proposal and negotiations b. Competitive procurement following unsolicited proposal c. Competitive procurement d. Sole-source negotiations e. Other _____	Unsolicited proposal followed by negotiations.
3.	What is the title and date of the primary PPP agreement? Who are the parties to that agreement? What is the form of the private entity (e.g., corporation, LLP, LLC, partnership or joint venture)? If a joint venture, is there joint and several liability? Are the obligations of the private entity guaranteed by one or more third parties (other than sureties)?	Comprehensive Agreement to Develop and Operate Route 895 Connector, made and entered into as of June 3, 1998, by and between the Virginia Department of Transportation, and FD/MK Limited Liability Company (the Developer). FD/MK is a limited liability company. The obligations under the Comprehensive Agreement and Design-Build Contract and a \$5 million line of credit were guaranteed by Fluor Corporation and Morrison Knudsen.
4.	Does the PPP agreement contemplate a subsequent assignment of the private entity's rights to another entity, such as a non-profit corporation to be formed for the purpose of financing the project?	Yes. The rights and obligations under the Comprehensive Agreement are to be transferred to Pocahontas Parkway Association, a non-profit, 63-20 corporation that issued tax-exempt bonds to finance the project.

5.	Describe conditions applicable to the financing plan (types, sources, and covenants of capital financing).	The project was financed with a combination of \$348 million of tax-exempt bonds issued by the Association and secured by a first lien on project revenues, an \$18 million State Infrastructure Bank loan from the Commonwealth of Virginia and a \$5 million line of credit from the design-build contractor.
6.	What other major ancillary agreements are there? Are other agreements contemplated to be executed in the future (e.g., such agreements might include a design-build contract, a concession agreement, a full or partial completion guaranty and/or financing agreements)?	The other major ancillary agreements include: Design-Build Contract; Completion Guaranty; Project Financing Agreement; SIB Loan Agreement; Contractor Loan Agreement; Master Indenture.
7.	What are the roles of the public and private entities for pre-financing tasks, such as project definition, preparation of environmental documents, permitting, traffic and revenue studies, surveys, geotechnical investigations, right-of-way acquisition and preliminary engineering, public involvement?	The agreement was executed about a month prior to the financing of this project. VDOT agreed to pay the developer \$1.5 million for certain early design tasks. The remaining pre-development work was done by the developer at its own risk prior to signing.
8.	How is the private entity to be compensated for pre-financing costs (e.g., current reimbursement, reimbursement from financing proceeds, development fee, return-on-equity contribution)?	\$6 million was paid to developer at closing as a development fee.
9.	How is the private entity to be compensated for its equity and debt contributions? How is the private entity to be compensated for post-financing design, acquisition, permitting, construction, and related services? How is the private entity to be compensated for operation and maintenance services?	Unlike more recent deals, no equity contribution was made by the private developer. The Developer is compensated for design and construction from bond proceeds under the Design-Build Contract. Holders of bonds issued by the nonprofit association are secured by toll revenues. VDOT assumed responsibility for operation and maintenance, to be paid from toll revenues, after payment of project debt service and operating expenses.
10.	Is the public entity required to exercise its power of eminent domain to facilitate the transportation facility?	VDOT is to acquire title to and, as necessary and appropriate, condemn, all rights of way for the project, as detailed in the Design-Build Contract.
11.	Does the public entity establish the design, construction, operation and maintenance standards with which the private entity must comply?	Yes.
12.	Describe any payment due from the private entity to the public entity for the grant of rights.	None.
13.	What is the mechanism by which user fees, if any, are established and adjusted? Describe any limitations or user fees and exempt vehicles.	First two years of toll rates are set forth in the contract. VDOT has the right to adjust the tolls thereafter, subject to a requirement to meet the covenants in the Indenture.

14.	Describe any revenue recovery between the public and private entities.	Developer has no right to toll revenues. Funds in the Surplus Account are to be applied at the direction of VDOT for any purpose related to the project, including retirement of debt and reimbursement of expenses paid by VDOT.
15.	What is the duration of the agreement and what are the options to extend this timeframe (if applicable)?	The Term ends on the latest date when the Bonds, the SIB Bond and the Contractor Bond are paid or defeased.
16.	What are the major performance milestones that will be required of the parties, including the public entity and the private entity?	VDOT had the right to terminate the agreement if bonds were not sold by December 31, 1998.
17.	Describe measures of compensation upon termination for convenience.	VDOT must pay the Association all amounts necessary to retire and defease all outstanding bonds and to pay all amounts due under the Design-Build Contract. (Section 16.2)
18.	Describe any performance standards, performance warranties, or performance guarantees.	Detailed performance standards are set forth in the Design-Build Contract.
19.	If applicable, describe the private entity's rights and obligations to provide future project capacity improvements, extras, or expansions.	<p>See extensive provisions in Section 9.1, including:</p> <p>The Department shall have the right from time to time to develop, operate and maintain Project Enhancements, defined as any extensions of or additions to or major modifications of the Project. through (i) its own personnel, materials and equipment; (ii) contracting with third parties through requests for proposals, competitive bids, negotiations or any other lawful procurement process; and (iii) provided funding is available therefor, authorizing and directing the Operator to undertake the Project Enhancements through subcontracting for necessary traffic and revenue studies and for necessary planning, design, engineering, permitting, financial, right-of-way acquisition, utility relocation, construction, installation, project management, operation, maintenance, repair and other work and services.</p> <p>Operator shall not undertake any Project Enhancements unless directed to do so by the Department.</p>
20.	Who is responsible for the operation and maintenance of the completed facility?	All operation and maintenance responsibilities are delegated to VDOT.
21.	Does the private entity have the right to make and enforce, with the consent of the public owner, reasonable rules with respect to the transportation facility?	No provision.

22.	Describe any provisions relative to competitive transportation facilities (include a description of what constitute competitive facilities, exceptions, and measure of damages).	<p>"Competitive Transportation Facilities" are defined as any State highway crossing the James River within 3 miles of the project's bridge crossing. The Department agrees that it shall not, subject to certain exceptions, (i) initiate, authorize, franchise or finance private Competitive Transportation Facilities; (ii) open any Department owned or operated Competitive Transportation Facilities; and (iii) fail to exercise all discretionary authority available to it under Laws, Regulations and Ordinances to prevent any other governmental or private entity from developing Competitive Transportation Facilities, including but not limited to connections to State Highways. (Section 12.1).</p> <p>Association's and the Trustee's sole and exclusive remedy for a violation of this covenant shall be to recoup an amount equal to the loss of Toll Revenues proximately caused by the Department's action as determined by the Toll Consultant (Section 17.9(b)).</p>
23.	Is the private entity required to reimburse the public entity for services? For design review? Permitting? Operation and maintenance? Policing?	<p>The Department is to be compensated for right-of-way acquisition costs and services, and its Oversight Services relating to (i) the construction, installation and equipping of the Project and all other Work under the Design-Build Contract except design and permitting. From and after the first to occur of the Opening Date or the Final Acceptance Date, and (ii) to Operator's non-delegated responsibilities for management, administration and promotion of the Project. (Section 10.2)</p> <p>The Operator must also compensate VDOT for all its delegated responsibilities, including (i) to manage and control traffic on the Project, snow and ice removal; (ii) to maintain and repair the Project and all systems and components thereof, including but not limited to the ETTM Facilities and ETTM System; (iii) to operate the ETTM Facilities and ETTM System and otherwise to carry out the collection of tolls and user fees respecting the Project; (iv) to cause to be provided to the Project police and emergency services; and (v) to maintain, comply with and renew Regulatory Approvals necessary and incidental to the foregoing activities. (Section 8.3). Payment is to be made from available funds after payment of debt service on the bonds.</p>
24.	If applicable, what is the reasonable/ maximum return or rate of return on investment authorized for the developer/ operator to earn, the formula by which such rate of return will be calculated and the distribution of project revenues?	None provided since there is no equity investment.

25.	What events constitute developer/operator defaults, and what are the major remedies available to the public owner?	These include failure to perform any term of the agreement, the inaccuracy of any representation or warranty, failure to deliver a Project Agreement when required, events of bankruptcy of developer or Guarantor and event of default under design-build contract. VDOT has all remedies at law or in equity and can terminate the agreement and the Design-Build Contract. There are separate defaults for the Association.
26.	What other rights does the public entity have to terminate the agreement (e.g., failure to meet milestones, termination for convenience)? If the agreement is terminated for convenience, what compensation is paid to the private entity?	<p>Aside from VDOT's right to terminate for convenience (see response to Question 17, above), VDOT also has the right to terminate Developer's (but not the Association's) rights under the Comprehensive Agreement if it terminates Developer's rights under the Design-Build Contract.</p> <p>VDOT has the right to terminate the agreement if any condition to the issuance of the bonds is not satisfied and or the bonds are not issued by December 31, 1998.</p>
27.	What events constitute public entity defaults, and what are the remedies available to the developer/operator?	These include the failure to perform during the term of the agreement, inaccuracy of reps and warranties; an event of default by VDOT under any other Project Agreement; or the Virginia General Assembly enacts certain legislation that impacts only the Project or a class of operators or agreements under the states PPTA that materially impairs Developer's rights under the agreement.
28.	What are the lender's rights and remedies with respect to private entity defaults?	After the bonds are issued, VDOT's rights to terminate the agreement requires payment in full or defeasance of the bonds.
29.	How is the performance of the private entity secured (e.g., surety bonds, letters of credit or third party guarantees)?	The obligations of the Developer under the agreement, the Design-Build Contract and the Project Financing Agreement are secured by parent guarantees from Fluor and Morrison Knudsen.
30.	What indemnification obligations do each of the parties have?	Developer undertakes broad indemnities under the Design-Build Contract and other Project Agreements. There are no VDOT indemnities due to legal restrictions.
31.	<p>What are the obligations of the developer/operator to maintain records, to allow inspection and audit and to provide regular reports to the public owner?</p> <p>What obligation does the public entity have to maintain the confidentiality of specified information?</p>	<p>Developer has reporting requirements under the Design-Build Contract. The Association is required to furnish all reports as requested by VDOT. VDOT has the rights of audit and inspection.</p> <p>Developer has the obligation to assert and defend any claims for confidentiality under the Virginia Public Records Act. Any proprietary or confidential information must be specifically identified by the Developer.</p>

32.	<p>What are the conditions under which the private entity may assign its rights under the PPP agreement and/or its rights to the transportation facility?</p> <p>Does the PPP agreement contemplate a subsequent assignment of the private entity's rights to another entity, such as a non-profit corporation to be formed for the purpose of financing the project?</p> <p>Can it make an assignment for security?</p> <p>Can it transfer its rights and obligations to an affiliate or unrelated third party? What are the conditions, if any, to obtain the consent of the government entity?</p>	Other than Developer's right to assign its obligations to the Association on the bond closing date, neither Developer nor the Association have any right to assign their rights under the agreement or the other Project Agreements without the prior consent of VDOT. Any transfer of the right or practical ability to control the policies and decisions of the Developer or the Association, whether due to transfer of partnership or membership interests or otherwise, is deemed a prohibited assignment.
33.	Describe lender protection provisions (if any).	See above.
34.	What dispute resolution mechanisms are provided for?	Court proceedings.
35.	Describe any provisions regarding high-occupancy toll lanes or variable pricing.	None.
36.	Describe any provisions or HOV policy (if applicable).	None.
37.	Describe any provisions limiting liability or waiving consequential damages.	Developer is not liable for indirect, incidental or consequential damages of any nature, whether in contract, tort (including negligence) or other legal theory, unless arising out of the fraud or intentional misrepresentation of FD/ MK or any of its members, managers, partners, directors, officers, employees or agents.
38.	Describe any public subsidy of revenues (e.g. shadow tolls, assumption of operation and maintenance costs).	The Association's obligation to reimburse VDOT for costs of operation and maintenance are subordinated to the lien of the bonds on project revenues.

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